No. 88-1377

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

LOUIS W. SULLIVAN, Secretary of Health and Human Services,

Petitioner,

vs.

BRIAN ZEBLEY, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF THE NATIONAL EASTER SEAL SOCIETY, THE MUSCULAR DYSTROPHY ASSOCIATION, THE NATIONAL DOWN SYNDROME CONGRESS, VOICES FOR ILLINOIS CHILDREN, AND PLAINTIFF CLASS MEMBERS IN *MARCUS V. SULLIVAN*, NO. 85 C 453 (N.D. ILL.) AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

ROBERT E. LEHRER
(Counsel of Record)
JOHN M. BOUMAN
MARY ELIZABETH KOPKO
Legal Assistance Foundation of Chicago
343 South Dearborn Street
Room 700
Chicago, Illinois 60604
(312) 341-1070

Attorneys for Plaintiff Class Members in *Marcus v. Sullivan*

JOHN D. KEMP
70 East Lake Street
Chicago, Illinois 60601
(312) 726-6200

Attorney for the National Easter Seal Society

(List of Counsel Continued on Inside Front Cover)

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

ELLEN SIMON
810 7th Avenue
New York, New York 10019
(212) 586-0808

Attorney for the Muscular
Dystrophy Association

KATHLEEN MARAFINO
42 Middlesex Drive
St. Louis, Missouri 63144
(314) 567-6042

Attorney for the National
Down Syndrome Congress

VIRGINIA MARTINEZ
53 West Jackson Boulevard
Room 515
Chicago, Illinois 60604
(312) 427-4080

Attorney for Voices for
Illinois Children

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INTERESTS OF AMICI

I. THE ORGANIZATIONAL AMICI

A. The National Easter Seal Socicty ("ESS"), founded in 1919, is a national direct service organization for persons with disabilities of all ages. It was the first organization established to help children with disabilities. Through local Easter Seal Societies in every state, ESS serves over one million persons each year. Annually, over 600,000 children receive Easter Seal services, including physical, occupational and speech-language therapies, psychological counseling, and health screening for potentially disabling conditions.

B. The Muscular Dystrophy Association ("MDA"), founded in 1950, is a voluntary national health agency that is dedicated to conquering 40 neuromuscular diseases that generally affect children and young adults. These diseases include the several muscular dystrophies, as well as various types of motor neuron diseases, inflammatory myopathies, and metabolic diseases of the muscle, among others. Through its worldwide research programs, its nationwide program of patient and community services, and its program of public education, MDA strives to help those with neuromuscular disease and their families.

C. The National Down Syndrome Congress ("NDSC"), founded in 1974, is the national advocacy organization of families of children with Down syndrome, and of professionals and interested other persons who provide services to or otherwise assist persons with Down syndrome. Through over 500 local parent support groups, the NDSC carries on a broad range of activities. These activities include advocacy to secure the rights of persons with Down syndrome, the provision of information and other assis-

tance to families of persons with Down syndrome to help them meet the special needs of these individuals, and the promotion of public understanding of persons with Down syndrome.

D. Voices For Illinois Children ("VIC") is a statewide children's advocacy organization governed by business, community and civic leaders. It works to improve the lives of children—especially poor children—in Illinois by, *inter alia*, bringing about significant changes in governmental policies and practices. VIC seeks to achieve such changes through research, policy analysis, public education, and community service.

ESS, MDA, NDSC, and VIC serve many children from low income families who are severely disabled and who (representatives of each of these orgarizations believe) are eligible for Supplemental Security Income ("SSI") benefits under Title XVI of the Social Security Act (the "Act"). Nonetheless, many of these children that amici serve have been denied such benefits under the Secretary of Health and Human Services' (the "Secretary's") regulations at issue here.

II. PLAINTIFF CLASS MEMBERS IN *MARCUS V. SULLIVAN*

Plaintiff class members in *Marcus v. Sullivan*, No. 85 C 453 (N.D.Ill.), include children in Illinois who are identically situated to the *Zebley* children before the Court in this case, in that they have been denied SSI benefits under the same regulatory scheme the *Zebley* children have successfully challenged. *Marcus v. Heckler*, 620 F. Supp. 1218 (N.D. Ill. 1985) (certifying class). In *Marcus v. Bowen*, 696 F.Supp. 364 (N.D.Ill. 1988), *appeal pending*, No. 89-2717 (7th Cir.), the court invalidated the Secretary's application of certain SSI eligibility regulations on

similar grounds to those that prompted the court of appeals below to invalidate the regulations at issue here.

This Court's decision in *Zebley* will almost certainly have a decisive impact upon the claims of the children class members in *Marcus*.

ARGUMENT

SUMMARY OF ARGUMENT

I. This case raises the question of whether the Secretary may deny a child's claim for SSI disability benefits without individually assessing the extent to which his impairment(s) limit his functional capacities. In defending his refusal to offer such individual functional assessments to children, the Secretary seeks to establish the principle that children claiming SSI are to be subject to a fundamentally different and much stricter eligibility scheme than are adults. Under the Secretary's scheme, only "some" impairments can trigger a finding of disability for a child, whereas "any" impairment can do so for an adult.

II. The Act includes four distinct requirements that forbid the Secretary from determining the eligibility of a child claiming SSI benefits other than by a system that measures the functional loss of all his impairments. First, the Act requires that he assess the "severity" of a child's impairments. 42 U.S.C. § 1382c(a)(3)(A). Second, it requires that he do so on an individualized basis. *Id.* ("if *he* suffers from any . . . impairment of comparable severity.") (emphasis added). Third, it provides that "*any* . . . impairment of comparable severity" must give rise to a child's eligibility. *Id.* (emphasis added). Finally, the Act provides that "the *combined impact* of the impairments shall be considered throughout the disability determination process." 42 U.S.C. § 1382c(a)(3)(F) (emphasis added).

The Secretary's method of determining eligibility for SSI child's disability benefits flouts these statutory requirements, which make eligibility turn on the functional loss a child's impairments impose on him. Under the Secretary's regulatory scheme, a child may establish his eligibility for SSI benefits only by showing that his impairment(s) meets or equals an impairment set forth in a "listing" of impairments. 20 C.F.R. § 416.924 (1988). However, the listings themselves (including only 184 impairments for adults and/or children) cover but a small fraction of the possible impairments or combinations of impairments from which a child may suffer. *See*, 50 Fed. Reg. 50068 (1985). The decisive point is that, for a variety of reasons, there is no way for the many children without any listed impairment or with combinations of impairments (no one of which meets the listings) to "meet" or "equal" the listings at all—*regardless of how severely they may be disabled by the impact of their impairments. See e.g.*, Social Security Ruling ("SSR") 83-19 ("[I]t is incorrect to consider whether the listing is equaled on the basis of an assessment of overall functional impairment. . . . The functional consequences of the impairments . . . , irrespective of their nature or extent, *cannot* justify a determination of equivalence." SSR 83-19 (J.A. at 239-40) (emphasis in original).

III. The Secretary's major defenses of his eligibility determination policy are all unpersuasive.

A. The central statutory directive here is that the "severity" of a child's impairments and those of an adult be "comparable." As even the Secretary acknowledges, this directive obliges similarity (between the directives being compared) as to at least " 'one or two salient points.' " Pet. Br. at 24. The Secretary's failure to consider the overall functional impact of a child's impairments upon him is a failure to undertake any comparison at all respecting

the singular "salient" feature of severity determinations under the Act: they are, by definition, functional determinations.

B. Contrary to the Secretary's contention, there would be nothing "unworkable" about a functional assessment standard that asks about a child's ability to perform age appropriate activities. The "ability to perform age appropriate activity" standard is precisely the general "benchmark" standard that the Secretary said would be appropriate in children's cases at the inception of the SSI program. Disability Insurance Letter ("DIL") III-11 (September 7, 1973); DIL III-11, Supplement 1 (January 9, 1974). Moreover, the Secretary's most recent revisions of the regulations confirm his view that the "age appropriate activities" benchmark for children is a workable analytic analog to the "ability to work" benchmark for adults. 20 C.F.R. § 416.994(c) and (c)(1)(ii) (1988).

C. The regulatory history establishes that, far from adopting his current policy contemporaneously with the Act, and pursuing it consistently since, the policy the Secretary announced at the inception of the Act—and pursued for at least six and one-half years thereafter—was very nearly the opposite of the one he now defends before this Court.

I.

INTRODUCTION

The Act establishes that a child will be eligible for benefits if he suffers from "any" impairment that is of "comparable severity" to one that would be disabling for an adult. 42 U.S.C. § 1382c(a)(3)(A). This case raises the question of whether the Secretary may deny a child's claim for SSI disability benefits without individually assessing the extent to which his physical and mental impairments limit his functional capacities.

The court of appeals below ruled that the Act, 42 U.S.C. § 1382c(a)(3)(A), did oblige such an individualized assessment of the functional impact of impairments, and it held that the Secretary's eligibility regulations transgressed this statutory directive. Appendix to Petition for Writ of Certiorari ("Pet. Ap.") at 2a, 17a.[1] In defending those regulations in this case, the Secretary seeks to establish the principle that children claiming SSI are to be subject to a fundamentally different and much stricter eligibility scheme than are adults. Under the Secretary's scheme, only "some" impairments that are of "comparable severity" to those that would be disabling for an adult can trigger a finding of disability for a child. These are the impairments that he determines to meet or "medically equal" his limited listing of impairments. 20 C.F.R. § 416.924 (1988). See § II.B., *infra*. Children with "other" impairments are simply found "not disabled," without any assessment of the overall functional severity of their impairments at all.

II.

THE SECRETARY'S METHOD OF DETERMINING ELIGIBILITY FOR SSI CHILD'S DISABILITY BENEFITS VIOLATES THE SOCIAL SECURITY ACT.

A. The Act Requires The Secretary To Adjudge Children's Eligibility By Individually Assessing the Functional Impact of Each Child's Impairments Upon Him.

Title XVI defines the eligibility of children for SSI benefits as follows:

[1] The court of appeals did not "jettison the entire regulatory framework", as the Secretary asserts. Brief for the Petitioner ("Pet. Br.") at 42. The court did not invalidate any particular regulation, but focused on an *omission* in the regulatory scheme.

> An individual shall be considered to be disabled for purposes of this subchapter if he is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months (or, *in the case of a child under the age of 18, if he suffers from any medically determinable physical or mental impairment of comparable severity*.)

42 U.S.C. § 1382c(a)(3)(A) (emphasis added). This definition is the basis for three statutory requirements that are central to the case: that disability will be found if impairments have a "severe" enough impact upon the child's functional capacities; that "any" impairment that is "severe" enough will be the basis of a finding that disability exists; and that the Secretary will assess each claimant individually to determine whether "he" has "any" impairment that is "severe" enough to be disabling. The Act also establishes a fourth requirement important here: that the Secretary must assess the combined impact of all of each claimant's impairments. 42 U.S.C. § 1382c(a)(3)(F).

1. The term "severity" in the definition of disability requires the Secretary to assess the impact of a child's impairments upon his functional capacities. The textual referent of the phrase "comparable severity" is to the "severity" of impairments that disable an adult. The Act defines the level of impairment severity that disables an adult in functional terms: it is the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment . . . [The impairment must be] of such severity that [the claimant] is . . . unable to . . . work." 42 U.S.C. §§ 1382c(a)(3)(A) and (B). "Severity" is thus a matter of the degree to which an adult's ability to engage in work-related activities is limited—or, in the case of children, the degree to

which their functional abilities are "comparably" limited. *See, Bowen v. Yuckert*, 482 U.S. 137, 146 (1987) (Act takes "functional approach" in defining disability). *See also*, 54 Fed. Reg. 33238, 33241 (proposed August 14, 1989) (children's mental impairment listings):

> "In childhood cases, as with adults, severity is measured according to the functional limitations by the medically determinable . . . impairment."

2. The statute also says that it is "*any* . . . impairment of comparable severity" that should give rise to a child's eligibility for benefits. 42 U.S.C. § 1382c(a)(3)(A) (emphasis added). "Any" impairment(s) that results in "severe" enough limitations upon the child's functional capacities must be the basis of a disability finding.[2] The Secretary may not (as he has, see § II.C., *infra*) implement a scheme for determining children's disability in which only "some" impairments can result in a finding of disability.

3. The Act's definition provides for individualized determinations of disability, not for generalized "average child" or "most children" determinations. "[I]n the case of a child . . . , if *he* suffers from any medically determinable physical or mental impairment of comparable severity." 42 U.S.C. § 1382c(a)(3)(A) (emphasis added). The statutory

[2] The Secretary, plainly bothered by the word "any" in the statute, says that it is a "slender statutory reed" on which to invalidate the Secretary's regulations. Pet. Br. at 19. Labels like that are not helpful. Congress used the word "any" in the statute to modify "impairment" and, as in the federal welfare statute at issue in *Shea v. Vialpando*, 416 U.S 251 (1974), it presumably meant that word to carry its usual and ordinary meaning of "all." *See, id.* at 260 (When statute required state agency to consider "any" expenses attributable to the earning of income in determining eligibility of families with children under federal-state welfare program, state was required to consider "all" such expenses, not just some of them).

directive in this respect is the same as it is for adults, as to whom the statute provides that "an *individual* shall be determined to be under a disability only if *his* physical or mental impairment or impairments are of such severity . . . ." 42 U.S.C. § 1382c(a)(3)(B) (emphasis added). The measurement of functional loss must therefore involve an "individualized determination[ ]." *Heckler v. Campbell*, 461 U.S. 458, 467 (1983).

4. The Act provides that "the *combined impact* of the impairments shall be considered throughout the disability determination process." 42 U.S.C. § 1382c(a)(3)(F) (emphasis added). Only through an assessment of each claimant's overall functional loss can the Secretary consider the combined impact of all impairments. The claimant's *overall* functional loss necessarily represents the sum of the effects of all of his impairments.

In sum, the Act includes four distinct requirements that forbid the Secretary from denying a child's claim for SSI benefits without measuring the functional loss of his particular impairments. As we discuss in § II.B., *infra*, however, the Secretary has adopted a disability determination system for children that does not offer the requisite individualized functional assessment—and so transgresses each of these statutory directives.

B. Under The Secretary's Method Of Determining Eligibility, Many Children Are Denied SSI Disability Benefits Without Having Received an Individualized Assessment Of The Functional Impact of Their Impairments Upon Them.

1. The Secretary has determined that a child may establish his eligibility for SSI benefits only by showing that his impairment(s) meets or equals an impairment set forth in a "listing" of approximately 184 impairments. 20 C.F.R. § 416.924 (1988). *See*, 20 C.F.R. Part 404, Subpart P, Ap-

pendix 1 (setting forth the listings) (J.A. at 115-235).[3] Each "listing" is a specification of those medical criteria—signs, findings, and symptoms—respecting a particular impairment that a claimant with that impairment must meet or equal in order to be determined disabled. *Id.* More specifically, the Secretary presumes that any claimant who has an impairment that meets or equals a listing has a degree of functional loss "severe" enough to be disabling under the Act. 44 Fed. Reg. 18170, 18170-1 (1979). *See*, *Bowen v. City of New York*, 476 U.S. 467, 470-1 (1986).

For a child to "meet" a listing, he must establish that the medical findings respecting his impairment match or exceed each of the listed criteria for that impairment. SSR 83-19 (J.A. at 236-38). For a child to "equal" a listing, he must establish that the medical findings respecting his unlisted impairment or combination of impairments are equivalent to or exceed each of the listed criteria for one of the listed impairments—that is, they are alike in kind, duration and severity. SSR 83-19 (J.A. at 238-40).

The Secretary's requirement that children have an impairment that either meets or equals a listing in order to be eligible for benefits does not provide most children any individualized assessment of the functional impact of their impairments. There are a great many impairments and combinations of impairments that children have that do not meet or equal the listings, but that can have a "severe" enough impact upon a child's functional capacities to be disabling under the Act. The scheme does not allow a child to be eligible for benefits as the result of "any" impairment that is of the requisite "severity".

[3] There are actually two listings for children. The Part A listings (at 20 C.F.R. Part 404, Subpart P, App. 1, §§ 1.00-13.00) apply to adults and children; the Part B listings (at 20 C.F.R. Part 404, Subpart P, App. 1, §§ 100.00-113.00) apply to children alone. 20 C.F.R. § 416.925 (1988).

a. The listings themselves cover only a small fraction of the possible impairments a child may have. The Secretary himself has consistently acknowledged that the listings are not meant to include and do not include most medical impairments. *See*, 50 Fed. Reg. 50068, 50069 (1985) (While the "listing includes medical conditions frequently diagnosed for people who file for disability benefits . . . [it] does not include all impairments."). Only approximately 184 impairments are listed. In contrast, the Merck Manual, an authoritative source of medical information, lists 21 categories of disorders, and most categories include dozens of impairments. The Merck Manual (R. Berkow and J. Talbott, Eds. 13th Ed. 1977). *See*, *id.* at 1313-15 (listing 125 different rheumatoid disorders). Similarly, the Diagnostic and Statistical Manual of Mental Disorders III-R ("DSM III-R") lists at least 48 mental disorders that normally are evident only in infancy, childhood or adolescence. American Psychiatric Association, DSM III-R at 25-95 (3rd Ed. Revised 1987). There are hundreds of other mental disorders that affect children as well as adults. *Id.* at 555-67. Another indication of the limited nature of the Secretary's listing of impairments can be found in the regulations of the Veterans Administration. The listing of impairments for the veterans disability programs includes over 700 impairments. 38 C.F.R. Part 4, Subpart B, §§ 4.40 *et seq.* and App. C.[4]

[4] Amicus MDA serves claimants whose impairments implicate a particularly dramatic example of the limitations of the listings. Muscular Dystrophy ("MD") is not found in the special children's listings. The adult listing sets forth one set of criteria for the disease. 20 C.F.R. Part 404, Subpart P, Appendix 1, § 11.13) (J.A. at 178). However, there are many different forms of MD (*E.g.*, Duchenne's, Becker's, Facioscapulohumeral, Limb-girdle, Ocular, Gower's, Steinert's), and there are numerous related neuromuscular disorders. Merck Manual at 1475-79. These each impose different functional limitations upon children, and many of these are not related to the listed criteria. *E.g.*, *id.* at 1478-79.

By the same token, the listings are not meant to include and could not realistically include all the combinations of impairments from which a child might suffer. Thus, even if the 184 medical impairments in the listings were the only impairments in the world, the number of possible combinations of these impairments that a particular child might have would be vast (theoretically, at least, equal to the product of 184 x 183 x 182 . . . x 3 x 2 x 1).

The listings include only a small fraction of the impairments and combinations of impairments that are severe enough to disable a child. A finding that a child does not suffer from a listed impairment, while answering the question of whether he "meets" the listings, therefore does not answer the question of whether he is disabled under the Act. Under the Secretary's regulations, a child cannot "meet" the listings if he does not have an impairment that is on the list. Even if the process of determining whether a child's listed impairment "meets" listed severity criteria can be said to constitute the individualized assessment of functional limitation required by the Act (as the Secretary insists), it plainly only does so for children who have solely a listed impairment.

b. The Secretary has promulgated the "equals" concept as the sole means for children without a listed impairment to prove disability. Under the equals concept, the Secretary "will decide that [a claimant's] impairment(s) is medically equivalent to a listed impairment . . . if the medical findings are at least equal in severity and duration to the listed findings." 20 C.F.R. § 416.926(a) (1988). Arguably, this formulation on its face could call for a comparison of the severity of the functional impact of the claimant's impairments with the functional severity level

exemplified by the listed impairments.[5] This is not, however, what the Secretary requires or allows under his authoritative interpretation of the equals concept in SSR 83-19 (J.A. at 236-43).

Under SSR 83-19, the equals concept is in fact quite the opposite of one that ensures an assessment of the functional impact of "any" impairment, i.e., of all unlisted impairments or combinations of impairments. The Ruling states: "[I]t is incorrect to consider whether the listing is equaled on the basis of an assessment of overall functional impairment. . . . The functional consequences of the impairments . . . , irrespective of their nature or extent, *cannot* justify a determination of equivalence." SSR 83-19 (J.A. at 239-40) (emphasis in original). The Secretary thereby forbids any "equals" finding based upon an individualized assessment of functional limitation. No unlisted impairment and no combination of impairments can ever be the subject of an assessment of its functional impact upon a child. No child with such an impairment or combination of impairments can be found disabled based upon the

[5] By calling for a comparison of impairment "severity", the regulation invokes the statutory term that is the basis for the requirement of a functional assessment. See § II.A.1., *supra*. The equals concept regulation is thus capable of a reading that would provide the individualized functional assessments that the court of appeals held to be fatally lacking in the regulatory scheme. *See*, *Tolany v. Heckler*, 756 F.2d 268, 272 (2nd Cir.1985) (requiring functional assessment to determine medical equivalence without questioning the facial validity of the regulations); *Williams v. Bowen*, 636 F.Supp. 699, 704 (N.D. Ill.1986) (same); *Taggart v. Heckler*, 576 F.Supp. 624, 627 (W.D.Ark.1984) (same). The Secretary's repeated insistence that the court of appeals facially invalidated the regulations is thus not only contrary to the text of the decision (finding the *omission* of a functional assessment to be fatal), it is in no way necessitated by the decision.

"severity" of the functional limitations caused by the impairment(s).[6]

To be sure, some claimants may, under SSR 83-19, be found eligible under an "equals the listings" analysis—but for reasons other than the functional limitations imposed by their impairments (since SSR 83-19 forbids an eligibility finding on this basis). The vice of the equals concept under SSR 83-19, however, is that most children claimants with unlisted impairments and combinations of impairments that result in functional limitations "severe" enough to be disabling will be found *not* to equal a listing, and will be denied benefits.[7]

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[6] The Secretary's restriction of the "equals concept in SSR 83-19," has transformed the equals concept from one under which almost half of all successful disability claimants established their eligibility to one under which substantially fewer do. Out of all favorable Title II decisions, "equals" constituted 43.9% while "meets" constituted 29.4% in 1975. "Equals" exceeded "meets" by 45.1% to 29% in 1976, and 41.9% to 34.2% in 1977. In 1980, the year that the policies embodied in SSR 83-19 became effective (See § II.C.4., *infra*), "meets" exceeded "equals" by 57.9% to 16.2%. "Equals" determinations were only 8.6%, 8.3%, 8.7%, 9.2%, 8.7%, 10.2%, and 11.0% of all favorable Title II decisions during 1982-1988 inclusive. Committee on Ways and Means, U.S. House of Representatives, "Background Material and Data on Programs Within the Jurisdiction of the Committee on Ways and Means", Section II, Table 2 (March 15, 1989).

[7] These are the children this case concerns. It thus does the Secretary no good to claim that his disability determination scheme provides an assessment of functional loss as to *some* impairments—the listed impairments in the special Part B listing for children in particular. Pet. Br. at 18. The children with such listed impairments are not mainly the ones who are injured under the Secretary's scheme. Respondents and the court of appeals were and are concerned with the much greater number of children *without listed impairments* who, for the reasons reviewed in § II.B. are not afforded an individualized determination of the functional severity of their impairments, and are, as a result, denied disability benefits to which they are statutorily entitled.

Two distinctive features of SSR 83-19, and two related examples, illuminate the precise nature of this vice. First, SSR 83-19 requires the medical findings relative to the claimant's impairments to be compared to the medical criteria in one listed impairment. The claimant's impairment must equal each of the listed criteria in order to satisfy the equals concept, *regardless* of the intensity of the findings as to any one of the listed criteria. "The level of severity in any particular listing section is depicted by the *given set* of findings and not by the degree of severity of any single medical finding—no matter to what extent that finding may exceed the listed value." SSR 83-19 (emphasis in original) (J.A. at 239). For example, the listing for juvenile rheumatoid arthritis calls for a number of criteria to be met, including "limitation of motion of two major joints of 50% or greater." 20 C.F.R. Part 404, Subpart P, Appendix 1 (1988) (J.A. at 209). If the child has limitation of motion in one major joint of 40% and in another major joint of 80%, he will not have met or equalled the listing, even if he has met or equalled all of the other listed criteria (e.g., joint inflammation, specific documentation of diagnosis). If the child has limitation of motion in each of two major joints of 80%, but does not equal all of the other criteria of the listing, he will not have satisfied the equals concept. In neither case will the Secretary consider the impact of the substantially greater limitation of range of motion upon the child's functional capacities, or, therefore, whether the functional limitations are "severe" enough to be disabling.

Second, SSR 83-19 requires that, for claimants with multiple impairments, adjudicators must identify the one listed impairment that is the same or closest to the claimant's most severe impairment. (J.A. at 240). Then the "set of symptoms, signs, and laboratory findings" for the claimant's various impairments are evaluated to determine

whether "combined, [they] are . . . medically equivalent in medical severity to that listed set to which the combined sets can be most closely related." (*Id.* at 239). Assume that a child's most severe impairment is juvenile rheumatoid arthritis, and that she also suffers from borderline mental retardation and a heart condition. She has limitation of motion in two major joints, but only of 40% in each (50% would meet the listing). Under SSR 83-19, the equals determination consists of deciding whether the medical findings relative to the mental retardation and heart condition somehow "make up for" or "constitute" the extra ten percent range of motion limitation that would have allowed the child to meet the juvenile rheumatoid arthritis listing. The determination must be made without the forbidden assessment of overall functional loss. Only the "values" of the medical findings are compared. (Does an IQ of 72 equal a 10% limitation in motion?)[8] Determinations under this method, made without the common denominator provided by a functional assessment, are extremely difficult and result in inconsistent adjudication. Fox, H., and Greaney, A., *Disabled Children's Access to Supplemental Security Income and Medicaid Benefits* ("Fox and Greaney"), Fox Health Policy Consultants, Inc., Washington, D.C. at 52-54 (December 1988) (copy lodged with the Court's clerk).

[8] The example does not portray the substantial problems that often arise when the adjudicators try to select the one impairment that is the most severe (in order to select the appropriate listing for comparison), or when adjudicators must select a listed impairment when the claimant's impairments offer no clear comparison or suggest more than one comparison. These problems implicate the outcome of each case. They create substantial inconsistencies in adjudication. *See, Marcus*, 696 F.Supp. at 378-79 n.18 (quoting the Secretary's own Quality Assurance Review dated April 27, 1984, which cites a high incidence of adjudicatory error "related to the inherent difficulty of evaluating and then combining the severity of several impairments . . . and to the inadequate policy guides which direct a physician to compare two dissimilar impairments to the listing most closely related to them. Unless one of the multiple impairments is clearly predominant, this comparison is not practical, especially when dealing with the situation in which a combination of exertional and nonexertional restrictions is present.").

The sort of determination required by SSR 83-19 simply does not answer the question of what the child can do despite his combined impairments. *See*, Fox and Greaney at 58-61. Many children who are not found disabled under the equals concept suffer from impairments that, in combination, are severe enough that they are, in fact, statutorily disabled. Stopping the disability determination after applying only the meets or equals test denies these children the statutory right to be found eligible if disabled by "any" impairment.[9]

[9] The shortcomings of the equals concept under SSR 83-19 fall particularly hard upon the children whom amicus NDSC serves: children with Down syndrome. Down syndrome is not a listed impairment, having been removed from the original listings because it allegedly has no standard manifestation and can be evaluated under listings for various body systems. 42 Fed.Reg. 14705, 14707 (1977). Relatively recently, however, the Secretary proposed listing criteria for Down syndrome. 52 Fed. Reg. 37161 (proposed October 5, 1987). These criteria, which the Secretary has not adopted, would establish the basic disabling criterion for Down syndrome to be "significant interference with age-appropriate major or daily personal care activities;" and they emphasize the likelihood that multiple body system impairments will have to be evaluated in combination to determine whether they are equal in severity to the listed criterion. *Id.* at 37162. Indeed, while Down syndrome is present when it is confirmed that a child has extra chromosome material, there may be as many as 300 different clinical signs that manifest themselves among persons having the impairment. Cunningham, C., *Down's Syndrome: An Introduction for Parents*, 102 (2nd Ed., 1988). Therefore, children with Down syndrome must depend heavily on proper analysis of combined impairments in order to prove eligibility for SSI benefits when no single one of their clinical manifestations meets a listing for the applicable body system. A great many of these children will not satisfy the Secretary's very narrowly defined equals concept for combined impairments. They have no chance to prove that they are disabled by the functional limitations imposed by their collective impairments.

(Footnote continued on following page)

C. Neither The "Statutory Language" Nor Any "Functional Considerations" In The Listings Save The Secretary's Eligibility Determination Method, And This Method Is Not Entitled To Any Deference.

The Secretary offers four major defenses of his policy of denying children's disability claims without assessing the individual's overall functional loss. He argues that the "statutory language" supports his policy. Pet. Br. at 27-30. He says that the listings are not "divorced from functional considerations." Pet. Br. at 42. See *id.* at 28. He insists that the functional assessment respondents seek and the court of appeals required is "wholly unworkable." Pet. Br. at 43. See also *id.* at 43-44. Finally, he defends his regulations as based on a contemporaneous and longstanding interpretation of the Act, entitling them to considerable deference. Pet. Br. at 35-8. None of these four defenses are persuasive.

1. The Secretary distorts and misreads the statutory language.

a. The Secretary says that "Congress did not direct that the severity of impairments for adults and children be identical, only that they be 'comparable' ", and that

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[9] *continued*

Down syndrome is just one of thousands of unlisted impairments, and yet there are approximately 54,000 children (under 18) with Down syndrome in the United States. Adams M., et al., *Down's Syndrome: Recent Trends in the United States*, J. A.M.A. Vol. 246, No. 7, at 759, table 3 (August 14, 1981) (approximately 4,000 births per year) and Baird, P. and Sadovnick, A. *Life Expectancy in Down Syndrome Adults*, The Lancet, December 10, 1988, at 1355, Fig. 2 (approximately 75% of children born with Down syndrome survive to age 18). (Thus 4,000 x 18 x .75 = 54,000). The scope of the numbers of children denied a proper evaluation of their impairments by the Secretary's regulatory scheme is thereby manifest, even assuming (conservatively) that no more than a few thousand of the 54,000 children with Down syndrome are financially eligible for SSI benefits.

that term "does not require complete similarity." Pet. Br. at 24. That is true. But whatever leeway the word "comparable" provides the Secretary with respect to the establishment of the level of "severity" that he will acknowledge as disabling as between adults and children, it does not permit him any leeway at all regarding the statutory requirement that a child may be disabled based on "any" impairment that has the requisite severity level. "Comparable" modifies "severity", not anything else. It certainly does not modify the requirement that the Secretary consider the combined impact of all impairments, which is found in an entirely different section of the Act, 42 U.S.C. § 1382c(a)(3)(F).

Moreover, as the Secretary acknowledges, the term "comparable" does oblige similarity (between the directives being compared) as to at least " 'one or two salient points.' " *Id.*, quoting *Webster's Third New International Dictionary* at 461 (1976). The statutory directive here is that the "severity" of a child's impairments and those of an adult be "comparable." The Secretary's failure to consider the functional impact of a child's impairments upon him is a failure to undertake any comparison at all respecting the singular "salient" feature of severity determinations under the Act: they are, by definition, functional determinations. In other words, as "severity" is a measure of functional limitation in adults, it cannot be made into other than a functional measure in children. That is what the Act means by "comparable severity": comparable measures of functional limitation.

b. The Secretary points out that when 42 U.S.C. § 1382c(a)(3)(A) requires that an adult claimant be unable to engage in substantial gainful activity "by reason of" his impairment, it is referring to the consequences of that impairment. Pet. Br. at 25. In contrast, he says, the statute contains no express reference to a child's disability

being "by reason of" his impairment, only that the impairments be of "comparable severity" to ones that would disable an adult. *Id.* The Secretary concludes from this language that the "consequences" of a child's impairments—that is, the functional impact of his impairments—are irrelevant in determining his eligibility. This argument asks far too much of the statutory language, and asks even more from the absence of statutory language. Among other things, the argument ignores the fact that the basis for functional assessments in the disability definition comes from the word "severity" and its textual context, not from the words "by reason of." It also ignores the fact that the Act separately requires consideration of the "combined *impact*" of all impairments. 42 U.S.C. § 1382c(a)(3)(F) (emphasis added).

c. The Secretary says that the "pivotal term 'severity' has been used by the Secretary and Congress under the Social Security disability programs to refer to a *medically* severe impairment, the degree of which is based on medical evidence alone." Pet. Br. at 25. (emphasis added). He suggests that the court of appeals' ruling would require the Secretary to evaluate children's eligibility by reference to " 'nonmedical factors such as education and experience.' " *Id.*, quoting *Bowen v. Yuckert*, 482 U.S. at 149 n.7. But the court of appeals ruling clearly anticipates no such result. The ruling would oblige the Secretary to determine what a child whose impairments do not meet or equal a listing can do in spite of his impairments. When he makes this type of determination in adult cases, the Secretary says he is determining the residual functional capacity ("RFC") of the claimant. The Secretary's own regulations provide that "[r]esidual functional capacity is a *medical* assessment." 20 C.F.R. § 416.945 (1988) (emphasis added). *See*, SSR 83-10 (same). *See also*, 20 C.F.R. § 416.946 (1988) (referring to RFC determinations as being based on "all the medical evidence we have.").[10] The assessment the Secretary must make under the court of appeals ruling is, in short, a "medical only" assessment. *See*, Pet. App. at 17a (Secretary must afford children "the opportunity for individual evaluations comparable to the residual functional capacity assessment for adults.").

d. The Secretary points out that subparagraph (B) of 42 U.S.C. § 1382c(a)(3), "does not identify any non-medical factors that must be considered on an individualized basis in children in the same manner that an adult's age, education, and work experience are taken into account." Pet. Br. at 29 (emphasis added). He contends further that it is this language in subparagraph (B) that requires him to make functional assessments for adults, and that the absence of any "comparability" clause in that provision, among other factors, undermines any contention that the Secretary must offer the children here any "comparable" assessment of the functional impact of their impairments. *Id.* at 30. He makes the related suggestion (Pet. Br. at

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[10] In referring to RFC in his brief, the Secretary consistently characterizes it as involving an assessment of "non-medical" factors. *E.g.*, Pet. Br. at 18, 26. In light of the express language of his own regulations and rulings, that characterization is untenable. Moreover, several of the listings themselves incorporate functional assessments as to elements of the listed criteria. *E.g.*, § 7.10C (inability to use a prosthesis effectively) (cited as functional criterion by Secretary in SSR 83-19). (J.A. at 122, 238); 54 Fed. Reg. 33238 (proposed Aug. 14, 1989) (Proposed children's mental impairment listings adopt functional approach to assessing even listed mental impairment). The Secretary correctly insists that the listings consist of "medical only" factors. It follows that functional factors, by virtue of their presence in the listings, are medical factors. Finally, this Court in *Yuckert* upheld the Secretary's "medical only" threshold severity step in the sequential evaluation process in part because it conformed to the Act's requirement of a "functional approach" to eligibility determinations. *Yuckert*, 482 U.S. at 146. This Court has thus acknowledged that under the Act "function" is a "medical" consideration.

28-29) that the absence of any specific reference to "children" in subparagraph (B) indicates that Congress did not mean children to receive such a functional assessment.

However, the requirement that the Secretary determine a child's eligibility by individually assessing the functional impact of his impairments upon him is grounded in the Congressional direction—in subparagraph (A)—that the Secretary determine the "severity" of a child's impairments. See § II.A.1., *supra*. The absence of a comparability clause in subparagraph (B) is therefore of no account here. Moreover, the word "severity" is not used in subparagraph (A) with respect to adults, but only in subparagraph (B). Thus the term "comparable severity" used in subparagraph (A) with respect to children necessarily incorporates the adult "severity" definition contained in subparagraph (B). Further, Congress introduced subparagraph (B) with the phrase, "for purposes of subparagraph (A)," indicating that the dictates of subparagraph (B) were to guide the determination of "severity" (including "comparable severity") under subparagraph (A). As for the fact that "children" are not specifically mentioned in subparagraph (B), they are not specifically mentioned in 42 U.S.C. § 1382(a)(3)(F)(G) and (H) either. These provisions require the Secretary, *inter alia*, to consider the combined impact of claimants' impairments when determining their eligibility, to adopt "uniform standards" to govern disability determinations, and to apply a "medical improvement" standard when terminating disability benefits. If subparagraph (B) does not apply to children (because it does not specifically refer to them), then, by the same logic, these succeeding provisions would not apply to children either—an obviously preposterous result.

2. The Secretary's vigorous insistence that the listings are "not divorced from functional considerations," Pet. Br. at 42, appears designed to advance the argument that,

while few, if any, children claiming SSI receive an individualized functional assessment of the overall impact of their impairments, all children claiming benefits receive *some* type of individualized functional assessment by means of an "individualized" determination of whether they meet or equal the listings. See Pet. Br. at 27.

Amici do not quarrel with the proposition that some listings "take into account functional . . . consequences of impairments . . . ." *Id.* But the great majority of children are those with unlisted impairments or combinations of impairments. An assessment of whether they meet the functional component of a listed impairment that is not their only impairment, or that they do not suffer from at all, does not answer the question of what functional capacities they retain despite the impairments that they do have. These children will be denied benefits even if their impairments are of disabling severity. By performing an assessment that includes something he can label "functional", the Secretary does not disguise the fact that the assessment is not adequate under the Act.

3. There would be nothing "unworkable" about a functional assessment standard that asks about a child's ability to perform age appropriate activities. As amici note *infra* (in § II.C.4), the "ability to perform age appropriate activity" standard is precisely the general "benchmark" standard that the Secretary said would be appropriate in children's cases at the inception of the SSI program. Indeed, the Secretary's most recent revision of the regulations confirms his view that the "age appropriate activities" benchmark for children is the analytic analogue to the "ability to work" benchmark for adults. Specifically, the regulations the Secretary has promulgated to comply with the Disability Reform Act of 1984, define a child's continuing eligibility for SSI partly in terms of whether there has been any "medical improvement" in the claim-

ant's "impairments." The regulations instruct SSA decision-makers that, if there has been medical improvement, they should determine whether "this medical improvement is related to . . . [claimant's] ability to work (*i.e. . . . [his] ability to perform age appropriate activities*)." 20 C.F.R. § 416.994(c) and (c)(1)(ii) (1988) (emphasis added). To be sure, the question of whether a child is able to perform age appropriate activities is but a general "benchmark standard," a common denominator for evaluating the disabling severity of any impairment or combination of impairments. The Secretary might also wish to develop specific implementing criteria relating specific ages, abilities, and levels of limitation. This would be a complex task. But he has developed this sort of implementing criteria before, such as the detailed and sophisticated set of criteria that implement the application of the vocational factors in adult cases (the "grids"). *See, Heckler v. Campbell*, 461 U.S. 458 (1983). The Secretary, who does not even acknowledge his obligation to conduct functional assessments in children's cases, has, of course, never undertaken the effort of developing either a benchmark or implementing severity criteria for children (with unlisted impairments or with combinations of impairments). *See, Marcus*, 696 F. Supp. at 380-81.[11] He can therefore hardly be heard to complain either that no such criteria exist, or that he would be unable to develop them if he tried.

4. If the Secretary's regulations do not conform with the Act, they must fall regardless of whether they reflect a consistent and long-standing policy. *Mohasco Corp. v. Silver*, 447 U.S. 807, 825 (1980). In any event, the story the Secretary tells (Pet. Br. at 35-41) about his allegedly

[11] The proposed children's mental impairment listings contain age-appropriate functional activity levels for each impairment, but not for *overall* functional activity. 54 Fed. Reg. 33238 *et seq.* (proposed August 14, 1989).

"contemporaneous" and longstanding interpretation of the Act is belied by the regulatory history.

In September 1973, three months prior to the effective date of the SSI program (January 1, 1974), the Secretary issued to state disability adjudicators charged with administering the program a pre-regulatory directive that stated:

> Historically, the term "disability" has, under Title II, been associated exclusively with an inability to work, which is a primary activity of adults. This term, when applied to children, cannot properly be associated with an inability to work, since children are not ordinarily expected to engage in such activity. *Accordingly, disability in children must be defined in terms of the primary activity in which they engage, namely growth and development, the process of maturation.* Additionally, children even with the same diagnosed disease as an adult, may have different pathophysiologic manifestations of that disease, and the impact of the disease may be different. . . .
>
> These factors make it impossible to compare directly the severity of the child's impairment with that of an impairment which would prevent an adult from engaging in SGA; thus in applying the [eligibility] guides [for children], "comparable severity" means that the severity *of the impact* of the child's impairment(s) must be "comparable" to the severity *of the impact* of an impairment(s) which would prevent an adult from engaging in any substantial gainful activity."

DIL III-11 (J.A. at 90-91) (emphasis added, except as to phrase "of the impact").

Two features of DIL III-11 particularly distinguish it, given the Secretary's insistence that the policy he defends here is one he adopted at the inception of the SSI program. First, it emphasizes the necessity for an assessment of the functional "impact" of a child's impairments. Second, the directive reflects the Secretary's recognition that

the anomaly of applying an "inability to work" test for children obliged him to develop a benchmark standard for children (analogous to the "inability to work" standard for adults) that would permit an individualized functional assessment of their impairments. The Secretary described this benchmark in precisely the terms he now disparages: the ability of children to perform age appropriate activities. ("[D]isability in children must be defined in terms of the primary activity in which they engage, namely growth, and development, the process of maturation.")

After the SSI program became effective, the Secretary issued a Supplement to DIL III-11. In DIL III-11, Supplement 1 (January 9, 1974) (J.A. at 94-114), the Secretary emphasized the importance of the equals concept not only in assessing impairments that are not listed, but in assessing combinations of impairments where no single one of them meets a listing: "Each impairment must have some substantial adverse effect on the child's major daily activities, and together must 'equal' the specified impact." *Id.* at 97. This is a description of the functional assessment the Act requires; the claimant's total functional loss is compared to a specified level of functional loss that the Secretary has established as the disabling level (the level exemplified by the listed impairments). The Supplement thus reaffirmed and clarified the notion that the equals concept was the mechanism to ensure to every claimant a functional assessment consistent with the Act.

On March 16, 1977, the Secretary promulgated the first final regulations governing the children's disability program, including the new children's listing of impairments. 42 Fed. Reg. 14705 (1977). He adopted the equals concept intact from the Title II wage earner program, adding only that he would determine equivalence "with appropriate consideration of the particular *effect* of disease processes in childhood." *Id.* at 14708 (emphasis added). This was a

reaffirmation that the equals concept would examine functional limitations in children.

On August 20, 1980, the Secretary promulgated an amendment to the equals concept. 45 Fed. Reg. 55566, 55566-67 (1980), codified as 20 C.F.R. § 416.926. He maintained, however, that the amendment incorporated no change in policy respecting medical equivalence. 45 Fed. Reg. 55566, 55576 (1980).

The Secretary's representation to the contrary, SSR 83-19 discloses that the 1980 regulatory amendment was in fact meant to effect a change in policy. As we have explained (at § II.B.1.b, *supra*) this ruling, far from ensuring an individualized assessment of the functional impact of "any" impairment a child has, thus expressly forbade such an assessment. It also stated that "[t]he policy explained herein was effective August 20, 1980, the date the regulations covering the basic policy in the subject area were effective (45 FR 55566)". (J.A. at 243).[12]

The change in policy under the 1980 regulatory amendment (via the 1983 ruling, SSR 83-19) completely reversed the Secretary's prior and contemporaneous understanding of the Act's requirement of a functional assessment for all claimants who have an unlisted impairment or a combination of impairments. It was this earlier policy that Congress had before it when it enacted the law requiring the Secretary to publish his children's disability

[12] SSR 83-19 also governs Title II eligibility determinations for widows, widowers and surviving divorced spouses. In *Marcus v. Bowen*, 696 F. Supp. at 379-80, the court held that these "spousal" claimants, as well as children claimants, were statutorily entitled to have their eligibility for disability benefits determined by individualized functional assessments of their impairments. Even if this Court rules against the children respondents here, however, the claims of these spousal claimants may survive. At least this is so to the extent that the Court predicates any such (adverse) ruling on statutory language that applies to children but not Title II spousal claimants.

policies, including the listing of impairments, in 1976. Unemployment Compensation Amendments of 1976, Pub. L. No. 94-566, § 501(b), 90 Stat. 2667, 2685 (1976). If Congress can be said to have ratified anything by that law, as the Secretary vigorously argues, it was that earlier policy.

In sum, far from adopting his current policy contemporaneously with the Act and following it consistently since, the policy the Secretary announced at the inception of the Act—and pursued for at least six and one-half years thereafter—was very nearly the opposite of the one he now defends before this Court. The policy he now defends therefore does not reflect either a contemporaneous construction of the Act or a long standing administrative practice, and it is not entitled to deference.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

ROBERT E. LEHRER
(Counsel of Record)
JOHN M. BOUMAN
MARY ELIZABETH KOPKO
Legal Assistance Foundation
of Chicago
343 South Dearborn Street
Room 700
Chicago, Illinois 60604
(312) 341-1070

Attorneys for Plaintiff Class
Members in *Marcus v. Sullivan*

JOHN D. KEMP
70 East Lake Street
Chicago, Illinois 60601
(312) 726-6200

Attorney for the National
Easter Seal Society

(List of Counsel Continued on Following Page)

ELLEN SIMON
810 7th Avenue
New York, New York 10019
(212) 586-0808

Attorney for the Muscular
Dystrophy Association

KATHLEEN MARAFINO
42 Middlesex Drive
St. Louis, Missouri 63144
(314) 567-6042

Attorney for the National
Down Syndrome Congress

VIRGINIA MARTINEZ
53 West Jackson Boulevard
Room 515
Chicago, Illinois 60604
(312) 427-4080

Attorney for Voices for
Illinois Children